Miller & Chevalier, chartered
655 15th Street, NW, Suite 900
Washington DC 20005-5701
tel 202 626 5917
fax 202 628 0858
pkoenig@milchev.com
www.millerchevalier.com

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January 15, 2002

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Office of the United States Trade Representative ("USTR")
600 17th Street, NW
Washington DC 20508

Re: §201/203 Safeguards, Certain Steel Products; Exclusion Request for Indian Stainless Steel Bar, Wire Rod and Angles in Particular; Opposition to Section 201 Import Restrictions on Stainless Steel Products in General

Dear Ms. Blue:

The Indian stainless steel producer Viraj Group submits these comments, answering the submissions of U.S. producers. These comments expand on Viraj's prior comments. Specifically, no § 201 action should be taken against Indian stainless steel bar, wire rod, wire and flanges/fittings, for the following reasons.

Stainless Steel Bar (ITC Product Category 25)

There was no recent increase in stainless steel bar imports, one of the necessary conditions for any § 201/WTO safeguards action. In fact, bar imports free-fell 17% between the first half of 2000 and 2001. See ITC *Steel*, Inv. No. TA-201-73, Vol. III: Information Obtained in the Investigation (Stainless Steel Products and Appendixes), USITC Pub. 3479 (Dec. 2001) at Stainless-11. This steep drop was primarily the result of current U.S. anti-dumping investigations of bar imports. See *Stainless Steel Bar from the United Kingdom, Taiwan, Germany, Italy and Korea* (66 Fed. Reg. 40192 (2001).[1]

Further, U.S. producers fail to offer any §201 adjustment plans to reduce their production costs such that they would be price competitive with the allegedly 51.8% lower import prices (*Steel*, supra at Stainless-86) after any § 201 safeguard measures end. Thus, they have failed to show that their proposed § 201 remedies would achieve the requisite positive adjustment to imports. See 19 U.S.C. § 2253(a)(1)(A).

Indeed, in the ITC investigation, U.S. producers were asked to report their efforts to compete more effectively in the U.S. market. Not one U.S. producer reported undertaking cost reductions to compete more effectively. See *Stee*l, supra, Vol. III at Stainless-90. When asked what adjustments they would undertake to compete more effectively under § 201 import relief, only 1 of 17 U.S. producers indicated it would reduce costs. *Id.* at Stainless-91.

Finally, U.S. bar producers were operating at only 63% of capacity at the start of the ITC's period of investigation ("POI") – i.e., 1996 -- and yet still increased their production capacity 7% over the ensuing 1996- 2001 POI. *Steel*, supra, Vol. III at Stainless-24. U.S. producers thereby contributed to the excess capacity in the market that the U.S. Administration seeks to remedy. Still U.S. bar producers offer no capacity

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[1] In addition, antidumping duty orders are currently in place on bar imports from Brazil, India, Japan, and Spain. See *Steel*, Inv. No. TA-201-73, USITC Pub. 3469, Vol. II: Information Obtained in the Investigation (Carbon and Alloy Steel, Flat, Long, and Tubular Products) at Overview-6.

reductions in their §201 adjustment plans. No §201 import relief is warranted as to bar, only adjustment assistance.

In any event, India should be exempted from the application of §201 safeguards measures as to stainless steel bar (and wire rod, as also further discussed in the wire rod section)

Article 9.1 of the WTO Agreement on Safeguards[2] contains a developing country exception to the general safeguard rules:

> Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3%, provided that developing country Members with less than 3% import share collectively account for not more than 9% of total imports of the product concerned.

The President has applied this exception in past cases.[3] [4]

Article 9.1 does not identify the relevant period to determine the 3% and 9% thresholds. It makes sense for purposes of this §201 investigation to refer to the 3 most recent years the President finds representative of the subject imports as these are the years considered to determine quantitative restrictions. §19 U.S.C. 2253(e)(4). We believe that the representative period should be 1997-1999. But, whether that period or the period 1998-1999 is used, or the preceding period 1996-1998, developing WTO countries (e.g., India) individually were under 3% of total imports, and collectively were under

[2] See *Marrakech Agreement Establishing the World Trade Organization, Annex 1, Agreement on Safeguards, Art. 9, in The Results of the Uruguay Round of Multilateral Trade Negotiations: the Legal Texts at 315, 317 (1994).*

[3] See *Proclamation 7103 of May 30, 1998 to Facilitate Positive Adjustment to Competition from Imports of Wheat Gluten*, 63 FR 30359, 30360 (June 1998); *Notifications Pursuant to Article 12(C) and Article 9, Footnote 2 of the Agreement of Safeguards*, G/SG/N/10/U.S.A./2, G/SG/N/11/USA2 (June 8 1998); *Proclamation No. 7208- To Facilitate Positive Adjustment to Competitions from Imports of Lamb Meat*, 64 Fed. Reg. 37387, 37389 (July 9, 1999).

[4] Note that the U.S. Supreme Court states that U.S. law should "never...be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy, 6. U.S. (2 Cranch) 64, 118 (1804).*

9% of total imports, and thus should be excluded from any 201 safeguards actions. Combined imports from these developing countries of bar, as a share of total imports, are as follows: 1996, 3.71%; 1997, 3.30%; 1998, 2.85%, 1999, 3.87%.[5] Combined imports from developing countries for wire rod are: 1996, 2.2%; 1997, 1.02%; 1998: 2.34%; and 1999, 3.47%. Individually, India's import shares for bar and wire rod are also below 3% in each year, as follows:[6]

Product Group	1996	1997	1998	1999
Bar	2.0%	0.65%	1.8%	2.5%
Wire Rod	0.00%	0.32%	0.85%	1.0%

A recent WTO dispute panel (*United States-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* WT/DS202/R (October 29, 2001) found the U.S. in violation of WTO Article 9.1 and emphasized that this article " is clear in its mandate that a safeguard measure shall not be applied to imports of developing countries individually accounting for under 3% of total imports

[5] The methodology used to calculate these figures is as follows: 1) import quantities for the product group are calculated for each developing country that was a member of the WTO; 2) these figures are used to calculate each country's import share (based upon total imports of the product group) and 3) import shares for each country are aggregated to determine if they exceed 9%. All data used was taken from the ITC import data compiled by the U.S. Department of Commerce; it is the data that also appears in the ITC's web site as to this steel 201 case. The following countries were included as developing countries based on their GSP status and designation to the WTO: Albania, Argentina, Belize, Brazil, Cameroon, Chile, Colombia, Croatia, Czech Republic, Ecuador, Egypt, Romania, South Africa, Sri Lanka, Thailand, Turkey, Venezuela and Zimbabwe. (Other developing countries did not sell stainless bar or wire rod to the U.S. during these periods and thus did not have to be included in the figures)

[6] Figures calculated per fn 6.

and collectively under 9% of total imports," and that it is the affirmative obligation of the United States to on its own provide this exception.[7]

Alternatively, if one considered the entire ITC POI (1996 -2001), then India is 2.1% of bar imports, and developing countries are 5.6% of imports, such that the developing country exception to WTO safeguards actions continues to apply. And, also for the entire POI, India is 2.8% of total stainless steel wire rod imports, and developing countries are 3.2% of total such imports, such that again the developing country exception to WTO safeguards actions continues to apply..

Stainless Steel Angles should be excluded from any § 201 remedy

Stainless steel angles ("SSA") should be excluded from any remedy action. SSA was included in the ITC's affirmative §201 injury decision in the more general §201 product group composed of stainless steel bar and light shapes (ITC Product Group 25).

In May 2001 the U.S. imposed anti-dumping duties of 50% or more on SSA from Korea, Japan and Spain. See *Steel*, supra, Vol. II at Overview-6. SSA imports from Korea, Japan and Spain, which accounted for the vast majority (86%) of SSA imports, then essentially ceased as a result of prohibitive anti-dumping duties. See official U.S. import statistics for SSA, which fall under tariff numbers HSUS # 7222.40.30.20 and 7222.40.30.60. SSA imports overall dropped dramatically, about 60% in 2001, according to the same official import statistics. No more import restrictions are needed on SSA.

The ITC has long held that SSA is a separate "like product" from stainless steel bars, as in fact the two are not interchangeable and are distinct "like products" that serve

[7] *Safeguard Panel Report* at 105 ¶ 7.175.

distinct needs. See, e.g., *Stainless Steel Bar from Brazil, India, Japan and Spain*, Inv. No. 731-TA-678-679 and 681-682 (Review); USITC Pub. 3404 (March 2001); *Stainless Steel Angle from Japan, Korea and Spain*, Inv. No. 731-TA-888-890 (Final), USITC Pub. 3421 (March 2001). SSA was erroneously included in the same "like product" category as bar for § 201 purposes. Since bar and angle are not interchangeable in use (id.), they cannot be considered directly competitive and thus "like products" under the Section 201 "like product" definition that differs slightly from the anti-dumping "like product" definition. In any event, the appropriate remedy is for SSA to be excluded from §201 import restrictions on the basis that imposition of 201 import restrictions on SSA is not necessary to remedy any injury to the domestic industry. Viraj made this exclusion request in the ITC proceeding and before the TPSC since November 2001.

Stainless Steel Wire Rod (ITC Product Category 26)

There was also no recent increase in stainless steel wire rod imports, one of the necessary conditions for any §201/WTO safeguards action. Such wire rod imports fell 32% between the first half of 2000 and 2001. *Steel,* supra, at Stainless-12. The outstanding anti-dumping orders and recent U.S. Department of Commerce annual reviews significantly increasing the anti-dumping duties (e.g., from 0% to 10% in the case of Indian supplier Viraj) had a dramatic effect on wire rod imports.[8]

U.S. wire rod producers fail to offer § 201 adjustment plans showing that they could reduce their cost to the claimed 23% lower prices of imports (*Id.* at Stainless-86) to be competitive after any §201 import restrictions end. In fact, no U.S. producer of

[8] Antidumping and /or countervailing duty orders are currently in place on stainless steel wire rod imports from Italy, Japan, Korea, Spain, Sweden and Taiwan. See *Steel*, Inv. No. TA-201-73, USITC Pub. 3479, Vol. II: Information Obtained in the Investigation (Carbon and Alloy Steel Flat, Long and Tubular Products), at Overview-6.

stainless steel wire rod reported having undertaken any cost reduction measures over the POI, and only one of the five U.S. producers reported that it would undertake such measures if §201 import relief is granted. See *Steel*, supra, Vol. III at Stainless-90-91.

Finally, it was common knowledge in the market that U.S. wire rod producers were operating at well below production capacity over the POI (the ITC report would have actual figures) and yet they too increased their production capacity. See *Steel*, supra, Vol.1 at 215, 218. Again, U.S. wire rod producers fail to propose capacity reductions, despite themselves contributing to the alleged excess capacity.

Stainless Steel Flanges and Fittings (ITC Product Category 33)

Three of the ITC Commissioners found that imports of stainless steel flanges and fittings have not caused serious injury, nor threaten serious injury, to a U.S. industry, thus rejecting §201 action. The other three ITC Commissioners found injury. Thus, this product category has gone to the President for his decision, as the ITC is divided.

Serious questions exist whether the real ITC vote was 3 to 2 <u>against</u> any §201 action given court appeals as to whether Commissioner Devaney (one of the 3 affirmative votes for this product) was legally appointed. See attached. The President should accept the views of the 3 ITC Commissioners finding <u>no</u> injury and reject § 201 import restrictions. The <u>negative</u> injury finding of 3 ITC Commissioners is sound. As stated by Vice-Chairman Okun and Commissioners Miller and Hillman, the domestic stainless steel flanges and fittings industry "remained profitable throughout the five full years of the POI, and saw its operating income levels improve considerably during the last year and half of the POI." *Steel*, supra, Vol. I at 252.

Further, there was no recent increase in imports of stainless steel flanges and fittings, one of the necessary conditions for any §201/WTO safeguards action. Imports of stainless steel flanges and fitting imports nose-dived 27% between the first half of 2000 and 2001 (*id.* at Vol. III at Stainless-19), as the new anti-dumping duties took effect.[9] No §201 remedies are needed.

Further, U.S. producers fail to offer § 201 adjustment plans showing that they could reduce cost to the allegedly 51.8% lower import prices (*id.* at Stainless-88) to be competitive after any §201 import restrictions end. In fact, only 2 of 17 U.S. producers of stainless steel flanges and fittings reported cost reductions in an attempt to compete more effectively in the U.S. market, and only one producer reported that it would undertake further cost reduction if 201 import relief was granted. See *Steel*, supra, Vol. III at Stainless-91.

In addition, several of the largest domestic flange and fitting producers declined to participate in the ITC § 201 investigation, as observed by ITC Commissioner Hillman. See also Posthearing ITC Injury Brief by Hogan & Hartson L.L.P. on SSFF, October 5, 2001, at 7–9. Such refusal to cooperate could not more clearly show their lack of interest in this matter. The inference that these producers are doing particularly well, and thus did not want to provide their data to the ITC, is warranted..

Finally, certain U.S. producers propose an import quota using 1993-95 as the alleged representative period. But the ITC has no data for that period. The domestic

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[9] Antidumping duty orders have been in effect for several years on stainless steel butt-weld pipe fittings from Japan, Korea, and Taiwan. In addition, in February 2001 antidumping duty orders were imposed on stainless steel butt-weld pipe fittings from Italy, Malaysia, and the Philippines. See *Steel*, supra, Vol. II at Overview-6.

industry never requested an expansion in the POI to collect data via the questionnaire process as to 1993-95. Thus, there is no record evidence to support the use of 1993-95 as the representative period.

What if we had data for the 1993-95 period and it showed that the U.S. stainless industry was operating at low capacity utilization during that period or was otherwise not doing especially well then? Would that show that the proposed import quota is ineffective? Would that also support an alternative remedy of adjustment assistance? These questions only highlight the lack of record evidence to support use of 1993-95 as the representative period for an import quota.

Stainless Steel Wire (ITC Product Category 28)

Three of the ITC Commissioners found that imports of stainless steel wire ("wire") have not caused serious injury, nor threaten serious injury, to a U.S. industry, thus rejecting § 201 action. The other 3 ITC Commissioners found injury. Thus, wire has gone to the President for his decision, as the ITC is divided. Serious questions exist whether, as a matter of law, the real ITC vote was 3 to 2 <u>against</u> any §201 action given court appeals as to whether Commissioner Devaney (one of the 3 affirmative votes on wire) was legally appointed. See attached. The President should accept the views of the 3 ITC Commissioners finding <u>no</u> injury and reject §201 import restrictions.

The <u>negative</u> injury finding of three ITC Commissioners is sound. As noted in the determinations of Vice-Chairman Okun and Commissioners Miller and Hillman, the wire industry increased its production 24.4% over the POI, while also increasing both its production capacity and capacity utilization rate. *Steel*, supra, Vol. 1 at 235-236. Industry profitability remained positive and stable. *Id.* The industry also recorded an increase in its share of the growing U.S. market. *Id.* at 237. Over the POI, wire imports fell 9% and, as a percent of U.S. production, dropped 6%. Between the first half of 2000 and 2001 wire imports were flat. *Steel*, supra, Vol. III at Stainless-14. In addition, wire imports oversold U.S. product by 20.8% in the most recent period. *Id.* at Stainless-78. In brief, wire imports were not injurious.

We appreciate the Trade Policy Staff Committee's consideration of these views.

Respectfully submitted,

Peter Koenig
Mitch Dale
MILLER & CHEVALIER, CHARTERED
655 Fifteenth St., NW, Suite 900
Washington, D.C. 20005
(202) 626-5800

American Metal Market, January 2, 2002

Offshore lawsuit targets Devaney's ITC post

By Nancy E. Kelly

WASHINGTON, Jan. 2 -- A lawsuit challenging the appointment of Dennis Devaney to the U.S. International Trade Commissioner last year could have negative ramifications for U.S. producers of grain-oriented silicon electrical steel.

The U.S. Court of International Trade recently gave the green light to a discovery motion filed on behalf of producers of grain-oriented electrical steel from Italy and Japan on Dec. 28, 2001, denying a motion of dismissal filed by the ITC and thus allowing the case to continue.

The suit over Devaney's appointment was filed shortly after the ITC voted three to three in a sunset review case last year to continue standing duty orders of 31.08 percent against subject imports from Japan and 60.79 percent against imports from Italy. A tie vote is considered an affirmative determination, allowing the duties to remain on the books.

Devaney, along with Stephen Koplan, chairman, and Marcia Miller voted to keep the duties in place. If the suit prevails and Devaney's appointment is ruled illegal, it potentially could jeopardize any close ITC determinations in which Devaney's participation caused the swing vote and possibly overturn some trade cases.

President Clinton named Devaney an ITC commissioner shortly before he left office last January. Lawyers filing the suit argued that the "attempted" recess appointment was invalid because there was neither a Senate recess at the time of the appointment nor a vacancy on the ITC. Devaney replaced then-commissioner Thelma Askey.

Devaney's appointment ended last month and he officially resigned as commissioner.

Washington steel interests welcomed Devaney's appointment as a replacement for Askey, who often voted against the domestic industry in anti-dumping and countervailing duty cases.